

**CHOY YUK KONG & ORS v. LANDYORK FARMING SDN BHD
& ORS**

A

HIGH COURT MALAYA, JOHOR BAHRU
EVROL MARIETTE PETERS JC
[ORIGINATING SUMMONS: JA-24NCC-12-07-2018]
15 SEPTEMBER 2019

B

COMPANY LAW: *Oppression – Minority shareholders – Allegations of conducts constituting oppression – Whether wrong must be personal wrong to minority shareholder and not distinct corporate wrong – Whether company acted in breach of memorandum and articles of association – Whether reliefs sought focused on benefiting minority shareholders in personal capacity – Whether allegations credibly denied – Whether disputes correctly channelled – Companies Act 2016, s. 346*

C

WORDS & PHRASES: *Oppression – Meaning of – Simple English – Burdensome, harsh and wrongful – Whether conduct that lacks degree of probity that members of company entitled to expect – Whether wrong must be personal wrong to minority shareholder and not distinct corporate wrong – Whether wrong qua shareholder and not personal dispute with company or majority shareholders or directors*

D

The plaintiffs were the minority shareholders of the first defendant company and the first plaintiff was also a director of the first defendant company. The second and third defendants were the shareholders of the first defendant company, whilst the fourth to eighth defendants were the directors of the first defendant company. The sixth and eighth defendants were also the directors and shareholders of the second defendant company, whilst the ninth defendant was the company secretary of both the first defendant and second defendant companies. The application concerned the plaintiffs' allegation of minority oppression under s. 346 of the Companies Act 2016 ('CA'). The alleged oppressive acts were: (i) failure/refusal of the defendants to issue share certificates to the first and second plaintiffs despite having injected a sum of RM352,484 into the first defendant company; (ii) abuse of power in bad faith in diluting the shares of the first and second plaintiffs, by allotting 600,000 shares to the second defendant; (iii) denial of the right of access to the books of accounts, audited accounts and all documents of the first defendant company, where the plaintiffs claimed amounted to oppressive conduct; (iv) unjustified payment for oil palm plantation where the plaintiffs claimed that a substantial amount of money was spent in cultivating oil palm on a piece of land ('Lot 6988') owned by Pertanian Daya Teguh Sdn Bhd ('PDT'), a subsidiary of the first defendant company; (v) unjustified and illegal transactions with U-Fresh Sdn Bhd ('U-Fresh'), a company related to the sixth and eighth defendants where the plaintiffs claimed that U-Fresh owed the first defendant company a substantial amount of money; (vi) failure to redeem a piece of land ('Lot 703') which the first and second plaintiffs claimed belong to them, but was charged to the bank for the benefit of the

E

F

G

H

I

- A first defendant company; and (vii) failure of the defendants to pay the first and second plaintiffs the sum of RM750,000, being an advance payment for the consideration of shares in PDT, which they claimed was still owing to them by the first defendant company.

Held (dismissing plaintiffs' application with costs):

- B (1) For a case to be brought within s. 181(1)(a) of the CA, the complainant must identify and prove 'oppression' or 'disregard' (*Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v. Ling Beng Sung*). There is no universal definition of 'oppression'. In simple English, 'oppression' means 'burdensome, harsh and wrongful'. It refers to conduct towards members of the company or some of them, that lacks the degree of probity which they are entitled to expect in the conduct of the affairs of the company (*Re HR Harmer Ltd*). In an application for oppression against the minority shareholders, it must be established that the wrong is a personal wrong to the minority shareholder and not a distinct corporate wrong. The personal wrong complained of must be a wrong *qua* shareholder and not a personal dispute with the company or its majority shareholders or its directors. (paras 11-14, 21 & 26)
- C
- D
- E (2) The Singapore Court of Appeal, in the landmark case of *Ho Yew Kong v. Sakae Holdings Ltd*, in interpreting s. 216 of the Singapore Companies Act, set out the following principles: (i) where an act of oppression features both personal wrongs against the shareholder and corporate wrongs against the company, the court needs to consider the real injury that is complained of and the essential remedy that is sought in ascertaining whether a minority oppression claim brought is an abuse of process; (ii) director's breach of his duty of care, skill and diligence in monitoring the management of his company's affairs would amount to oppression only if the negligent mismanagement is sufficiently serious; and (iii) a shareholder who complains of oppression may be precluded from seeking relief under s. 346 where it has an alternative remedy that is both appropriate and adequate to bring to an end the matters complained of. (para 22)
- F
- G
- H (3) The CA provides a separate and distinct remedy for corporate wrongs. Since the oppression provision under s. 346 can be invoked without the leave of court, and if successfully invoked, can result in the grant of a much broader range of remedies than those available in a statutory derivative action under s. 347, the undeniable concern is to ensure that the plaintiffs do not improperly pursue an action for minority oppression when a remedy under a statutory derivative action is more apt. A distinct corporate wrong, therefore, should be remedied by way of a statutory derivative action, found in ss. 347 and 348 of the CA. (paras 24 & 25)
- I

- (4) Part of the sum of RM352,484, which the first and second plaintiffs allegedly injected into the first defendant company, had been paid, as evidenced by the statement of financial position as at 31 December 2015 and notes to the financial statements as at 31 December 2015. In fact, it was the first plaintiff himself that had declined to subscribe to the shares of the first defendant company, and even agreed for the sum to be treated as a loan by him as director, to be repaid by instalments, free of interest, unsecured, and with no fixed repayment term. Therefore, it was inequitable and misplaced for the plaintiffs to claim minority oppression for a loan that was personal from the first and second plaintiffs to the first defendant company, and for which the first and second plaintiffs had agreed to be repaid *via* instalments and interest-free. (paras 28 & 30-32) A B C
- (5) Based on undisputed documentary evidence, the first plaintiff was informed that the percentage of his shareholding in the first defendant company would be diluted, which he had acknowledged, but refused to subscribe for new shares. In that light, it was inequitable and spurious for the plaintiffs to claim that the reduction of their shares was done in bad faith. (paras 34 & 36) D
- (6) The monies spent on cultivating oil palm on Lot 6988 which was owned by PDT was a decision taken by the first defendant company as part and parcel of its internal management. The plaintiffs were well aware of it and was directly involved in the purchase of PDT for the purposes of planting oil palm. Therefore, the plaintiffs were prevented from claiming that the conduct of the first defendant company was oppressive. Even if the plaintiffs' claim amounted to mismanagement of the first defendant company, it did not meet the threshold of 'oppression' required by s. 346 of the CA, as they had not demonstrated the grievance done to them as minority shareholders. (paras 37-43) E F
- (7) The first plaintiff, who was a director of the first defendant company, was deemed to have full access to the books of accounts, audited accounts and all documents of the first defendant company. Hence, the plaintiffs' claim of having been denied access to the office books, accounts and other documents of the company was unauthentic. Even if there were obstacles placed by the defendants to the plaintiffs' access to documents of the first defendant company, such conduct *per se* and without more, did not amount to oppression or other objectionable conduct to justify relief under s. 346 of the CA. (paras 47-49) G H
- (8) The plaintiffs were fully aware that the first defendant company had business dealings with U-Fresh. The complaint of giving credit terms by the first defendant company to U-Fresh was a non-issue since it was part and parcel of its business, and was an internal management issue. The plaintiffs' disagreement with the managerial decisions made by the defendants was not a basis for a finding of minority oppression. Merely I

- A establishing that the respondent's breach of fiduciary duty brought about by a transaction involving the assets of the company which had benefited the majority shareholder, would not suffice to enable a petitioner to obtain an order, unless the petitioner could show that it had suffered loss by reason of the transaction. Even if there was any truth in the plaintiffs' complaint, it would amount to a corporate wrong *per se* which had nothing to do with a minority oppression application. (paras 53, 55 & 58-60)
- B
- (9) The plaintiffs' allegations, that the defendants, by not redeeming Lot 703 had breached cl. 9.2 of the share sale agreement between the first and second plaintiffs and the second defendant, were not *bona fide*, unfounded and made with the aim of exerting pressure on the defendants to achieve collateral purpose, namely to force the defendants to redeem the charge created by the first and second plaintiffs over Lot 703 which was charged to the bank by the first and second plaintiffs in 1998 and 2004, which was prior to them selling part of their shares to the second defendant. (paras 62, 65 & 69)
- C
- D
- (10) PDT was purchased by the first defendant company *via* a share sale agreement and the shares were to be registered in the name of the first plaintiff and the sixth defendant in the amount of 50% each. A trust deed signed by the first plaintiff and the sixth defendant acknowledged that the shares of PDT were to be held by them as trustees for the first defendant company. The consideration for the PDT shares amounting to RM750,000 were paid by the first defendant company and, therefore, there was no reason for the first defendant company to pay the sum of RM750,000 to the first plaintiff. The minority oppression application on this ground was erroneous, as the plaintiffs' grouses were not *qua* shareholders but were personal disputes. (paras 70-77)
- E
- F
- (11) The plaintiffs' allegations did not amount to oppression against the plaintiffs *qua* members of the first defendant company, nor did they amount to unfairness or disregard of the plaintiffs' interest as shareholders. There were no complaints that the defendants as directors of the first defendant company had acted in breach of or beyond the memorandum and articles of association. The application was merely for the benefit of the first and second plaintiffs, not as shareholders but in their personal capacity. The defendants had adduced credible denials of the allegations made by the plaintiffs. The reliefs sought focused solely on benefiting the first and second plaintiffs. Hence, the disputes should not be channelled through a minority oppression application. (paras 78, 80, 82, 83, 87 & 88)
- G
- H

I

Case(s) referred to:

Cheah Ngun Ying v. Low Cheong & Sons Sdn Bhd & Ors [2009] 1 LNS 1498 HC (*refd*)
Chieng Siew Hui v. Promax Road Construction Sdn Bhd & Ors [2008] 10 CLJ 86 HC (*refd*)

Dato' Ting Check Sii v. Datuk Hj Mohamad Tufail Mahmud & Ors [2008] 7 CLJ 315 HC (*refd*)

Elder v. Elder & Watson Ltd [1952] SC 49 (*refd*)

Ho Yew Kong v. Sakae Holdings Ltd [2018] SGCA 33 (*refd*)

Koh Jui Hiong & Ors v. Ki Tak Sang & Another Appeal [2014] 2 CLJ 401 FC (*refd*)

Kumagai Gumi Co Ltd v. Zenecon-Kumagai Sdn Bhd & Ors And Another Application [1994] 1 LNS 73 HC (*refd*)

Ng Chee Keong v. Ng Teong Kiat Highlands Plantations Ltd [1979] 1 LNS 59 HC (*refd*)

Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd & Anor [1996] 4 CLJ 716 FC (*refd*)

Pan-Pacific Construction Holdings Sdn Bhd v. Ngiu-Kee Corporation (M) Bhd & Anor [2010] 6 CLJ 721 FC (*refd*)

Re Bellador Silk Ltd [1965] 1 All ER 667 (*foli*)

Re Five Minute Car Wash [1966] 1 All ER 242 (*foli*)

Re HR Harmer Ltd [1959] 1 WLR 62 (*refd*)

Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v. Ling Beng Sung [1978] 1 LNS 170 PC (*foli*)

Re Trivoli Freeholds Ltd [1972] VR 445 (*refd*)

Rinota Construction Sdn Bhd v. Mascon Rinota Sdn Bhd & Ors [2018] 2 CLJ 129 FC (*refd*)

Rock Nominees Ltd v. RCO (Holdings) Plc [2004] 1 BCLC 439 (*refd*)

Scottish Cooperative Wholesale Society Ltd v. Meyer [1959] AC 324 (*refd*)

Tan Kian Hua v. Colour Image Scan Sdn Bhd & Ors [2004] 6 CLJ 174 HC (*dist*)

Legislation referred to:

Companies Act 1965, s. 181

Companies Act 2016 ss. 346, 347, 348

Companies Act [Sing], s. 216

For the plaintiffs - YK Tee; M/s Han & Partners

For the defendants - KS Ong; M/s KS Ong & Co

Reported by S Barathi

JUDGMENT**Evrol Mariette Peters JC:****This Application**

[1] This application concerns an allegation of minority oppression as documented in the originating summons filed by the plaintiffs under s. 346 of the Companies Act 2016 (“the Companies Act”).

[2] Counsel for the defendants raised a preliminary objection that the filing of this application was incorrect as he claimed that the intitlement, as well as some of the reliefs, reflected a derivative action which should have been initiated under s. 347 of the Companies Act.

A [3] Based on the documents before me, I dismissed the preliminary objection and took the view that since the application was made under s. 346 of the Companies Act, it will be treated as such; and any claim of it being a derivative action would be judged on the actual contents of this application, rather than on its intitlement and reliefs.

B [4] However, I eventually dismissed the plaintiffs' application for the following reasons.

The Background Facts

C [5] The plaintiffs are minority shareholders of the first defendant company. The first plaintiff is also a director of the first defendant company.

[6] The second and third defendants are shareholders of the first defendant company, whilst the fourth to eighth defendants are directors of the first defendant company.

D [7] The sixth and eighth defendants are also directors and shareholders of the second defendant company, whilst the ninth defendant is the company secretary of both the first defendant and second defendant companies.

The Alleged Oppressive Acts

E [8] The following are the oppressive acts:

- (i) failure/refusal of the defendants to issue share certificates to first and second plaintiffs despite their claim of having injected a sum of RM352,484 into the first defendant company;
- (ii) abuse of power in bad faith in diluting the shares of the first and second plaintiffs, by allotting 600,000 shares to the second defendant;
- (iii) denial of the right of access to the books of accounts, audited accounts and all documents of the first defendant company, wherein the plaintiffs claim amounted to oppressive conduct;
- (iv) unjustified payment for oil palm plantation where the plaintiffs claim that a substantial amount of money was spent in cultivating oil palm on a piece of land ("Lot 6988") owned by Pertanian Daya Teguh Sdn Bhd ("PDT"), which is a subsidiary of the first defendant company;
- (v) unjustified and illegal transactions with U-Fresh Sdn Bhd ("U-Fresh"), a company related to the sixth and eighth defendants wherein the plaintiffs claim that U-Fresh owed the first defendant company a substantial amount of money;
- (vi) failure to redeem a piece of land ("Lot 703") which the first and second plaintiffs claim belongs to them, but is now charged to the bank for the benefit of the first defendant company; and

- (vii) failure of the defendants to pay the first and second plaintiffs the sum of RM750,000, being an advance payment for the consideration of shares in PDT, which they claim is still owing to them by the first defendant company.

A

The Reliefs Sought

[9] The following are, *inter alia*, the reliefs sought by the plaintiffs:

B

- (i) declarations to the effect that the defendants in exercising their powers as majority shareholders, directors, and company secretary, respectively, had acted in a manner that is oppressive and unfairly discriminatory, which had prejudiced the interests of the first defendant company and the plaintiffs as minority shareholders;
- (ii) that a firm of professional accountants be appointed by the plaintiffs to inspect the accounts and documents of the first defendant company, its subsidiaries and related companies (including PDT), to determine if there have been payments for illegal transactions; and if any such payments have been made, for those (including the defendants) who received or facilitated such payments to repay/retransfer/reimburse the first defendant company, its subsidiaries and related companies (including PDT);
- (iii) that Lot 703 be redeemed from the charge and the issue document of title ("IDT") be returned to the first and second plaintiffs;
- (iv) that the first and second plaintiffs be released from all personal guarantees to the loan taken for the benefit of the first defendant company;
- (v) that RM21,694.38 be returned to the first and second plaintiffs which they claimed was balance of the monies advanced for shares which were never allotted;
- (vi) that RM750,000 be returned to the first and second plaintiffs which they claimed was advanced for purchase of shares in PDT; and
- (vii) that the second defendant purchases the plaintiffs' shares in the first defendant company; or alternatively for the first defendant company, its subsidiaries and related company, that is PDT, be wound up.

C

D

E

F

G

The Law

H

[10] The starting point in addressing this application is s. 346 of the Companies Act 2016 which reads:

Section 346 - Remedy in cases of an oppression

- (1) Any member or debenture holder of a company may apply to the court for an order under this section on the ground:

I

- A** (a) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or debenture holders including himself or in disregard of his or their interests as members, shareholders or debenture holders of the company; or
- B** (b) that some act of the company has been done or is threatened or that some resolution of the members, debenture holders or any class of them has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or debenture holders, including himself.
- C** (2) If on such application the court is of the opinion that either of those grounds is established, the court may make such order as the court thinks fit with the view to bringing to an end or remedying the matters complained of, and without prejudice to the generality of subsection (1), the order may:
- D** (a) direct or prohibit any act or cancel or vary any transaction or resolution;
- (b) regulate the conduct of the affairs of the company in the future;
- (c) provide for the purchase of the shares or debentures of the company by other members or debenture holders of the company or by the company itself;
- E** (d) in the case of a purchase of shares by the company, provide for a reduction accordingly of capital of the company; or
- (e) provide that the company be wound up.
- F** (3) If an order that the company be wound up is made under paragraph (2)(e), the provisions of this Act relating to winding up of a company shall apply as if the order had been made upon a petition duly presented to the court by the company, with such adaptations as are necessary.
- G** (4) If an order under this section makes any alteration in or addition to any constitution, then, notwithstanding anything in any other provision of this Act, but subject to the order, the company concerned shall not have power without the leave of the court to make any further alteration in or addition to the constitution inconsistent with the order, but subject to the foregoing provisions of this subsection, the alterations or additions made by the order shall be of the same effect as if duly made by resolution of the company.
- H** (5) An office copy of any order made under this section shall be lodged by the applicant with the Registrar within fourteen days from the making of the order.
- I** (6) The applicant who contravenes subsection (5) commits an offence and shall, on conviction, be liable to a fine not exceeding ten thousand ringgit and, in the case of a continuing offence, to a further fine of five hundred ringgit for each day during which the offence continues after conviction.

[11] The leading authority on the scope of s. 346 of the Companies Act (formerly s. 181 of the Companies Act 1965) is the Privy Council case of *Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v. Ling Beng Sung* [1978] 1 LNS 170; [1978] 2 MLJ 227. In that case, Lord Wilberforce held that:

... for the case to be brought within s. 181(1)(a) at all, the complainant must identify and prove “oppression” or “disregard”.

[12] There is no universal definition of ‘oppression’ see (*Re Trivoli Freeholds Ltd* [1972] VR 445; and *Kumagai Gumi Co Ltd v. Zenecon-Kumagai Sdn Bhd & Ors And Another Application* [1994] 1 LNS 73; [1994] 2 MLJ 789).

[13] However, in simple English, ‘oppression’ means ‘burdensome, harsh and wrongful’ see (*Scottish Cooperative Wholesale Society Ltd v. Meyer* [1959] AC 324).

[14] It refers to conduct towards members of the company or some of them, that lacks the degree of probity which they are entitled to expect in the conduct of the affairs of the company (see *Re HR Harmer Ltd* [1959] 1 WLR 62).

[15] The question whether there is oppression or disregard or unfair discrimination, or whether the conduct complained of is ‘otherwise prejudicial’ is one that must eminently be determined according to the facts of each particular case (see *Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd & Anor* [1996] 4 CLJ 716).

[16] ‘Disregard’ in this context involves something more than a failure to take account of the minority’s interest, as there must be awareness of that interest and an evident decision to override it or brush it aside or set at naught the proper company procedure: per Lord Wilberforce in as (*Re Kong Thai Sawmill (Miri) Sdn Bhd (supra)*).

[17] The underlying theme of a minority oppression application is ‘unfairness’. Although the court has very wide discretion, the concept of fairness must be applied judicially and contextually, and the interpretation which is given by the court must be based upon rational principles.

[18] An indication of oppression is when there is visible departure from the standards of fair dealing, and a violation of the conditions of fair play which a shareholder is entitled to expect see (*Elder v. Elder & Watson Ltd* [1952] SC 49).

[19] However, the mere fact that one or more of those managing the company possesses a majority of the voting power and, in reliance upon that power, makes policy or executive decisions, with which the plaintiffs does not agree, is insufficient. Those who take interests in companies limited by shares have to accept majority rule. It is only when majority rule passes over

A into rule oppressive of the minority, or in disregard of their interests, that the section relating to minority oppression can be invoked (see *Re Kong Thai Sawmill (Miri) Sdn Bhd (supra)*).

B [20] Although a single act or omission on the part of the wrongdoers may constitute oppression that justifies relief; it is only actionable where by its very nature such act or omission has so devastating or far-reaching a consequence upon the rights of a member (see *Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd & Anor* [1996] 4 CLJ 716).

C [21] It is important to bear in mind that in an application for minority shareholders oppression, it must be established that the wrong is a personal wrong to the minority shareholder, and not a distinct corporate wrong. This caution was administered by the Federal Court in *Koh Jui Hiong & Ors v. Ki Tak Sang & Another Appeal* [2014] 2 CLJ 401; [2014] 3 MLJ 10, where it was held that the reliefs sought in the oppression action must be with a view to remedy the matters complained of; and that it would be an abuse of the oppression action where the nature of the complaint was misconduct rather than mismanagement. (see also *Rinota Construction Sdn Bhd v. Mascon Rinota Sdn Bhd & Ors* [2018] 2 CLJ 129; [2018] 1 MLJ 141).

E [22] On this note I also look to the fairly recent Singapore case of *Ho Yew Kong v. Sakae Holdings Ltd* [2018] SGCA 33 where the Singapore Court of Appeal in interpreting s. 216 of the Singapore Companies Act (which in gist is s. 346 of the Malaysian Companies Act) provided the following useful principles:

- F (i) where an act of oppression features both personal wrongs against the shareholder and corporate wrongs against the company, the court needs to consider the real injury that is complained of and the essential remedy that is sought in ascertaining whether a minority oppression claim brought is an abuse of process;
- G (ii) director's breach of his duty of care, skill and diligence in monitoring the management of his company's affairs would amount to oppression only if the negligent mismanagement is sufficiently serious; and
- H (iii) a shareholder who complains of oppression may be precluded from seeking relief under s. 346 of the Companies Act where it has an alternative remedy that is both appropriate and adequate to bring to an end the matters complained of.

[23] The Singapore Court of Appeal then laid down the following analytical framework to ascertain whether an oppression claim pursued under (s. 346), is an abuse of the process:

- I (i) Injury
- (a) What is the real injury that the plaintiffs seek to vindicate?
- (b) Is that injury distinct from the injury to the company and does it amount to commercial unfairness against the plaintiffs?

(ii) Remedy

A

- (a) What is the essential remedy that is being sought and is it a remedy that meaningfully vindicates the real injury that the plaintiffs have suffered?
- (b) Is it a remedy that can only be obtained under s. 346 of the Companies Act?

B

[24] The Companies Act provides a separate and distinct remedy for corporate wrongs. Since the oppression provision under s. 346 can be invoked without the leave of court, and if successfully invoked, can result in the grant of a much broader range of remedies than those available in a statutory derivative action under s. 347, the undeniable concern is to ensure that plaintiffs do not improperly pursue an action for minority oppression when a remedy under a statutory derivative action is more apt.

C

[25] A distinct corporate wrong, therefore, should be remedied by way of a statutory derivative action, found in ss. 347 and 348 of the Companies Act, which read:

D

Section 347 - Derivative proceedings

- (1) A complainant may, with the leave of the court initiate, intervene in or defend a proceeding on behalf of the company.
- (2) Proceedings brought under this section shall be brought in the company's name.
- (3) The right of any person to bring, intervene in, defend or discontinue any proceedings on behalf of a company at common law is abrogated.

E

F

Section 348 - Leave of Court

- (1) An application for leave of the court under s. 347 shall be made to the court without the need for an appearance to be entered.
- (2) The complainant shall give thirty days' notice in writing to the directors of his intention to apply for the leave of court under s. 347.
- (3) Where leave has been granted for an application under s. 347, the complainant shall initiate proceedings in court within thirty days from the grant of leave.
- (4) In deciding whether or not the leave shall be granted, the court shall take into account whether:
 - (a) the complainant is acting in good faith; and
 - (b) it appears *prima facie* to be in the best interest of the company that the application for leave be granted.
- (5) Any proceedings brought, intervened in or defended under this section shall not be discontinued, compromised or settled except with the leave of the court.

G

H

I

A [26] It is also important to note that the personal wrong complained of must be a wrong *qua* shareholder and not a personal dispute with the company or its majority shareholders or its directors (see *Dato' Ting Check Sii v. Datuk Hj Mohamad Tufail Mahmud & Ors* [2008] 7 CLJ 315).

B [27] Premised on the principles above, this court will have to ascertain whether the plaintiffs have established that there is oppression, disregard, unfair discrimination or whether the acts complained of are prejudicial to them (see *Pan-Pacific Construction Holdings Sdn Bhd v. Ngiu-Kee Corporation (M) Bhd & Anor* [2010] 6 CLJ 721).

C **Contentions And Findings**

Failure/Refusal Of The Defendants To Issue Share Certificates To First And Second Plaintiffs

D [28] Counsel for the plaintiffs submitted that although the first and second plaintiffs had injected a sum of RM352,484 into the first defendant company, they were not issued shares.

E [29] Reference was made to *Chieng Siew Hui v. Promax Road Construction Sdn Bhd & Ors* [2008] 10 CLJ 86, where a similar petition was allowed by the High Court on the basis that shares were not registered in favour of the applicant/petitioner.

F [30] It must be noted that first, part of that sum has been paid, leaving a balance of RM21,964.38 which is evidenced by the statement of financial position as at 31 December 2015 and notes to the financial statements as at 31 December 2015 attached as exh. NKC-6 to the affidavit-in-reply of the defendants dated 23 August 2018, deposed to by the sixth defendant, Ng Kong Chen.

G [31] Secondly, according to the facts of this case, the first plaintiff himself had declined to subscribe to the shares of the first defendant company, and had even agreed for the sum to be treated as a loan by him as director, to be repaid by instalments, free of interest, unsecured, and with no fixed repayment term.

H [32] Under such circumstances, I find it inequitable and misplaced for the plaintiffs to now claim minority oppression for a loan that was personal from the first and second plaintiffs to the first defendant company, and for which the first and second plaintiffs had agreed to be repaid *via* instalments and interest-free.

Abuse Of Power In Bad Faith In Reducing Plaintiffs' Shares

I [33] It is undisputed that 600,000 shares had been allotted to the second defendant in December 2013, thus diluting the plaintiffs' shares. In relying on the authority of *Cheah Ngun Ying v. Low Cheong & Sons Sdn Bhd & Ors* [2009] 1 LNS 1498, the plaintiffs claim this was done in bad faith.

[34] However, based on undisputed documentary evidence, the first plaintiff was informed that the percentage of his shareholding in the first defendant company would be diluted. He even acknowledged it, but refused to subscribe for new shares.

A

[35] This is evidenced by the agenda to Landyork Farming Sdn Bhd board of directors' meeting dated 21 June 2011 and the minutes of the directors' Meeting of Landyork Farming Sdn Bhd dated 8 August 2012, attached as exhs. NKC-4 and NKC-5 respectively to the affidavit-in-reply of the defendants dated 23 August 2018, deposed to by the sixth defendant, Ng Kong Chen.

B

[36] In light of such documentary evidence, it is inequitable and spurious for the plaintiffs to now claim that the reduction of their shares was done in bad faith.

C

Unjustified Payment For Oil Palm Plantation

[37] Plaintiffs claim that a substantial amount of money was spent on cultivating oil palm on Lot 6988 which is owned by PDT, a subsidiary of the first defendant company.

D

[38] My view is that first, this was a decision taken by the first defendant company as part and parcel of its internal management and therefore, there was nothing oppressive about it.

E

[39] I am guided by the words of Lord Wilberforce in *Re Kong Thai Sawmill (Miri) Sdn Bhd v. Ling Beng Sung (supra)*:

The mere fact that one or more of those managing the company possess a majority of the voting power and, in reliance upon that power, make policy or executive decisions, with which the complainant does not agree is not enough. Those who take interests in companies limited by shares have to accept majority rule. It is only when majority rule passes over into rule oppressive of the minority, or in disregard of their interests, that the section can be invoked ...

F

[40] Secondly, the first plaintiff was aware of the oil palm cultivation on Lot 6988. In fact, he was directly involved in the purchase of PDT which owned Lot 6988 for the purposes of planting oil palm at all material times.

G

[41] This is evidenced by Landyork Farming Sdn Bhd minutes of directors meeting held on 24 January 2007 and 28 May 2007, attached as exh. NCK9 to the affidavit-in-reply of the defendants dated 23 August 2018, deposed to by the sixth defendant, Ng Kong Chen.

H

[42] The plaintiffs, having full knowledge and involvement in the plantation are prevented from now claiming that the conduct of the first defendant company is oppressive.

I

- A [43] Thirdly, even if the plaintiffs' claim amounts to mismanagement of the first defendant company, it did not meet the threshold of 'oppression' required by s. 346 of the Companies Act (see *Ng Chee Keong v. Ng Teong Kiat Highlands Plantations Ltd* [1979] 1 LNS 59; [1980] 1 MLJ 45), as they had not demonstrated the grievance done to them as minority shareholders.
- B *Denial Of The Right Of Access To The Office Books Of Accounts, Audited Accounts And Other Documents*
- [44] The plaintiffs claim that they had been denied access to the office books, accounts and other documents of the company.
- C [45] Counsel for the plaintiffs relied on *Tan Kian Hua v. Colour Image Scan Sdn Bhd & Ors* [2004] 6 CLJ 174, to submit that inaccessibility to the office accounts amounted to oppressive conduct which justified the winding up of the first defendant company.
- D [46] I am unable to agree with this contention. First, in that case, the accounts were kept in the defendant's house, and secondly there were other grounds in that case which compounded the basis for the High Court to rule in favour of the plaintiffs in their allegation of minority oppression. Thirdly, the applicant who claimed minority oppression in that case were shareholders only and not directors.
- E [47] On the facts of the present case, it is to be noted that at all material times, the first plaintiff himself was a director of the first defendant company. He was, therefore, deemed to have full access to the books of accounts, audited accounts and all documents of the first defendant company. Reliance on *Tan Kian Hua v. Colour Image (supra)* is, therefore, misplaced.
- F [48] It is also my observation that this claim is unauthentic as the plaintiffs themselves had exhibited the report and financial statements for the financial year ended 31 December 2016 exhibited in the affidavit-in-support of the plaintiffs dated 31 July 2018, deposed to by Choy Yuk Kong, the first plaintiff.
- G [49] Even if there were obstacles placed by the defendants to the plaintiffs' access to documents of the first defendant company, in my view, such conduct *per se* and without more, does not amount to oppression or other objectionable conduct to justify relief under s. 346 of the Companies Act. It is to be borne in mind that although a single act or omission on the part of the wrongdoers may constitute oppression that justifies relief, it is only actionable where by its very nature such act or omission has so devastating or far-reaching a consequence upon the rights of a member (see *Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd & Anor (supra)*).
- H
- I [50] The plaintiffs, therefore, have not convinced the court that this alleged act has caused them to have suffered oppression as minority shareholders.

Unjustified And Illegal Transactions With U-Fresh Which Are Related To The Sixth And Eighth Defendants

[51] The plaintiffs claim that U-Fresh Sdn Bhd, which is a related company to the sixth and eighth defendants, owed the first defendant company an amount of RM2,963,264 as at 31 December 2016.

[52] The plaintiffs claim that the sixth and eighth defendants have breached their fiduciary duties as directors towards the first defendant company by dealing with U-Fresh without authorisation and in furtherance thereto, have fraudulently and dishonestly gained benefit/interest for U-Fresh without any justifiable reason.

[53] In my view, this argument is flawed. First, it cannot be denied that the plaintiffs were fully aware that the first defendant company had business dealings with U-Fresh which was incorporated by the second defendant company.

[54] In fact, U-Fresh was one of the purchasers of pigs bred by the first defendant company, and the plaintiffs were fully aware of the fact that U-Fresh purchased the pigs bred by the first defendant company at a reasonable price, and that the first defendant company had benefited from this association. In addition, U-Fresh relieved the pressure exerted by middlemen who were always attempting to control the price of pigs.

[55] Secondly, the complaint of giving credit terms by the first defendant company to U-Fresh is a non-issue since it is part and parcel of its business, and is an internal management issue. There was nothing oppressive about it.

[56] Guidance is obtained from the principles enunciated in *Re Five Minute Car Wash* [1966] 1 All ER 242 at p. 246, where it was stated:

The mere fact that a member of a company has lost confidence in the manner in which the company's affairs are conducted does not lead to the conclusion that he is oppressed; nor can resentment at being outvoted; nor mere dissatisfaction with or disapproval of the conduct of the company's affairs, whether on grounds relating to policy or to efficiency, however well-founded.

[57] It was also stated in *Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v. Ling Beng Sung* [1978] 1 LNS 170; [1978] 2 MLJ 227:

The mere fact that one or more of those managing the company possess a majority of the voting power and, in reliance upon that power, make policy or executive decisions, with which the complainant did not agree, is not enough.

[58] The plaintiffs may have disagreed with the managerial decisions made by the defendants but this is not a basis for a finding of minority oppression.

- A [59] Thirdly, it has been held that merely establishing that the respondent's breach of fiduciary duty brought about by a transaction involving the assets of the company which had benefited the majority shareholder, would not suffice to enable a petitioner to obtain an order, unless the petitioner could show that it had suffered loss by reason of the transaction (see *Rock Nominees Ltd v. RCO (Holdings) Plc* [2004] 1 BCLC 439).
- B [60] Therefore, even if there was any truth in the plaintiffs' complaint, this would amount to a corporate wrong *per se* which had nothing to do with a minority oppression application. Bearing in mind the principles enunciated in the case of *Koh Jui Hiong & Ors v. Ki Tak Sang & Another Appeal* [2014] 2 CLJ 401; [2014] 3 MLJ 10, *Rinota Construction Sdn Bhd v. Mascon Rinota Sdn Bhd & Ors* [2018] 2 CLJ 129; [2018] 1 MLJ 141 and *Ho Yew Kong v. Sakae Holdings Ltd* [2018] SGCA 33, I am of the view that the plaintiffs have not made a case for minority oppression on this ground.
- C *Failure To Redeem Lot 703*
- D [61] The plaintiffs claim that a piece of land belonging to the first and second plaintiffs (Lot 703) was charged to the bank for the benefit of the first defendant company, and that the land was agreed to be redeemed; and for the first and second plaintiffs to be released as guarantors but that was yet to be done. The plaintiffs claim that the defendants had failed to abide by this promise.
- E [62] The issues regarding the redemption of the land was in actual fact related to a share sale agreement ("the agreement") dated 26 September 2006 entered into between the first and second plaintiffs as the vendors, and the second defendant (Metalkat (Malaysia) Sdn Bhd) as the purchaser.
- F [63] Pursuant to cl. 3.6 of the agreement, the first and second plaintiffs had agreed to pay RM500,000 from the consideration received from the purchaser into the first defendant in return, for new issuance of shares to increase the issued and paid-up capital of the first defendant company.
- G [64] The defendants claimed that this was not done, and as a result it had affected the redemption of Lot 703 as the failure of the first and second plaintiffs to subscribe to the shares had reduced the funds in the first defendant company.
- H [65] The plaintiffs, on the other hand, claimed that the defendants by not redeeming Lot 703 had breached cl. 9.2 of the agreement.
- I [66] Counsel for the defendants submitted that the redemption was not effected as the first and second plaintiffs had breached cl. 3.6 of the agreement dated 26 September 2006 in that they had failed to pay the RM500,000 each to subscribe shares in the said company.

[67] I am of the view, that first, this has nothing to do with a minority oppression action simply because this dispute is not one in the plaintiffs' capacity as shareholders. It is a personal contractual dispute between first and second plaintiffs and the defendants, and it is a misapplication of s. 346 of the Companies Act by the plaintiffs to seek relief as minority shareholders when the relief here is for their own personal gain, in particular the first and second plaintiffs.

A

B

[68] Secondly, based on the correspondence between the solicitors of the first plaintiff and defendants, there was an admission by the first plaintiff through his solicitors, Messrs GS Tang Azizi and Partners in a letter dated 28 February 2011, that the first plaintiff had agreed that the defendants had not breached cl. 9.2 of the agreement, and that the first plaintiff "... will not proceed with their claim against the defendants for the discharge of the property ...". This letter was exhibited as exh. NCK2 to the affidavit-in-reply of the defendants dated 23 August 2018, deposed to by the sixth defendant, Ng Kong Chen.

C

D

[69] I am, therefore, in agreement with counsel for the defendants that these allegations are not *bona fide*, unfounded and are made with the aim of exerting pressure on the defendants to achieve collateral purpose, namely to force the defendants to redeem the charge created by the first and second plaintiffs over Lot 703 which was charged to the bank by the first and second plaintiffs in 1998 and 2004, which was prior to them selling part of their shares to the second defendant.

E

Failure Of The Defendants To Pay RM750,000 To The First And Second Plaintiffs Being An Advance Payment For The Consideration Of Shares In PDT

F

[70] The first and second plaintiffs claimed that an advanced payment of RM750,000 for the consideration of shares in PDT had been made to the first defendant company, but that the first defendant company had failed to repay such amount.

[71] The background facts were that PDT was purchased by the first defendant company *via* a share sale agreement dated 9 November 2006 made between Alias bin Ahmad, Amir bin Ali and Yap Keong Wah as the vendors of 100,000 shares in PDT, and Chaw Koon Heng, the first plaintiff and the sixth defendant as purchasers of the shares. Those shares were to be registered in the name of the first plaintiff and the sixth defendant in the amount of 50% each.

G

H

[72] A trust deed dated 9 November 2006 was then signed by Chaw Koon Heng, the first plaintiff and the sixth defendant, whereby the first plaintiff and sixth defendant acknowledged that the shares of PDT were to be held by them as trustees for the first defendant company.

I

[73] Both the PDT share sale agreement and trust deed reveal that the PDT shares were paid for by the first defendant company.

A [74] This is evidenced by the share sale agreement and trust deed attached as exhs. NKC7 and NKC8 respectively to the affidavit-in-reply of the defendants dated 23 August 2018, deposed to by the sixth defendant, Ng Kong Chen.

B [75] There was, therefore, no reason for the first defendant company to pay the sum of RM750,000 to the first plaintiff.

[76] It appears, therefore, that this is nothing but an attempt to recover a disputed sum of RM750,000 allegedly paid by the first plaintiff for the purchase of PDT shares.

C [77] The minority oppression application on this ground is again erroneous, as whatever grouses the plaintiffs have are not grouses *qua* shareholders but are personal disputes.

Conclusion

D [78] It is my view that the plaintiffs' allegations set out above does not amount to oppression against the plaintiffs *qua* members of the first defendant company, nor do they amount to unfairness or disregard of the plaintiffs' interest as shareholders.

E [79] The reminder in *Dato' Ting Check Sii v. Datuk Hj Mohamad Tufail Mahmud & Ors* [2008] 7 CLJ 315 is timely at this juncture where it was stated that s. 346 of the Companies Act relief 'is only applicable to case where the oppressive conduct affects the petitioning member *qua* member.

F [80] It is also important to note that there were no complaints by the plaintiffs that the defendants as directors of the first defendant company had acted in breach of or beyond the memorandum and articles of association.

[81] In fact there were even no claims at all by the third and fourth plaintiffs.

G [82] This reinforces my view that this application was merely for the benefit of the first and second plaintiffs, not as shareholders but in their personal capacity.

H [83] The claims by the plaintiffs that the defendants had acted against the interests of the first defendant company were also misplaced as they were distinct corporate wrongs which were independent of the plaintiffs' rights as minority shareholders. Whatever disputes the plaintiffs had with the first defendant company, its directors or majority shareholders should not be channelled through a minority oppression application, as it was not a grievance in their capacity as shareholders of the said company.

I [84] The reminders and caution administered by the courts in *Koh Jui Hiong & Ors v. Ki Tak Sang & Another Appeal* [2014] 2 CLJ 401; [2014] 3 MLJ 10, *Rinota Construction Sdn Bhd v. Mascon Rinota Sdn Bhd & Ors* [2018] 2 CLJ 129; [2018] 1 MLJ 141 and *Ho Yew Kong v. Sakae Holdings Ltd* [2018] SGCA

33, must be heeded, to prevent the plaintiffs from seeking an order not with the genuine object of obtaining the relief claimed, but with the predominant object of exerting pressure to achieve a collateral purpose.

[85] Furthermore, it is my view that the plaintiffs were not genuine when they complained of the wrongs against the first defendant company. I am therefore guided by the case of *Re Bellador Silk Ltd* [1965] 1 All ER 667, where it was decided that if it is discovered that the applicant is seeking an order to achieve a collateral purpose, the court will dismiss the application as being an abuse of process of the court.

[86] I also look to *Kumagai Gumi Co Ltd v. Zenecon-Kumagai Sdn Bhd & Ors And Another Application* [1994] 1 LNS 73; [1994] 2 MLJ 789 where it was stated that at the end of the day, the judge must decide the application on the evidence before it. If allegations are made in affidavits by the plaintiffs and those allegations are credibly denied by the defendants in affidavits, the judge must ignore the disputed allegations. The judge must then decide the fate of the application based on undisputed facts.

[87] Looking at the facts as they are, I find that the defendants had adduced credible denials of the allegations made by the plaintiffs.

[88] Taking into account the relationship history between the plaintiffs and defendants, and considering the reliefs sought, and the fact that they were focused solely on benefiting the first and second plaintiffs only, I am sceptical of the *bona fides* of the plaintiffs in pursuing this application for minority oppression.

[89] For the foregoing reasons, the plaintiffs' application is dismissed with costs in the sum of RM12,000 (subject to the payment of allocator fees).

A

B

C

D

E

F

G

H

I